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No. 89-1217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY
ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *and* BRIEF OF CENTER ON NATIONAL LABOR POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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July 26, 1990

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BRIEF FOR CENTER ON NATIONAL LABOR POLICY AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Center on National Labor Policy, Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

A continuing subject of concern for the Center has been the development of non-union member employee rights enforced under section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and pursuant to section 2, Eleventh (a) of the

Railway Labor Act, 45 U.S.C. § 152(a). The practices of the labor organizations underlying the instant case involve the chargeability of certain activities to the non-member employees as related to their statutory duty as a collective-bargaining agent

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. Briefs amicus curiae have been filed by the Center advocating the validity of this public policy interest in other cases before the Court, including, *Koons Ford of Annapolis, Inc. v. NLRB*, No. 87-1305; *Breen v. ILGWU*, No. 83-1791; *Archie E. Brown v. FEC*, No. 81-1905; *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council*, No. 80-1257; *New York Telephone Co. v. N.Y.S. Dept. of Labor*, No. 77-961.

Center attorneys have also previously appeared before the Court representing the similar interests of objecting non-member employees under the National Labor Relations Act in *Price v. International Union, UAW*, 487 U.S. 1229, 108 S.Ct. 2980, 101 L.Ed.2d 924 (1988), *vacating*, 795 F.2d 1128 (2d Cir. 1986), *rev'g* 621 F. Supp. 1243 (D. Conn. 1985). The remand of that case has taken the two-hundred fifty-two plaintiffs in *Price* through a summary judgment path now permitting their local bargaining representative to rely upon the expenditures of the International Union, UAW, for purposes of determining chargeable expenses and allowing an evidentiary "local presumption" that the percentage of chargeable expenditures of the International Union can be applied to the Local Union rather than financial disclosure by the Local Union based on its direct unit expenditures. In reliance upon the decisions arising under the public sector laws, without proof that the activities charged relate to the statutory bargaining duties with their employer, *Price v. International Union, UAW*, 722 F. Supp. 933, 939 (D. Conn. 1989), the district court adopted the reasoning of the vacated Second Circuit opinion as its own. A notice of appeal to the United States Court of Appeals for the Second Circuit was timely filed by the plaintiffs in *Price* on July 23, 1990.

Moreover, Center attorneys have monitored the judicial progression of the litigation in *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989), which presents a liberal rule of chargeable bargaining expenditures. That case has been vacated based upon the en banc rehearing in the Fourth Circuit under Fourth Circuit Rule 35(c). *Crawford* was argued Oct. 3, 1989 and the decision deferred pending final outcome of Lehnert by this Court). *Crawford* was cited by the majority panel opinion in the case before this Court.

The parties to the instant case are primarily focusing on the important constitutional and judicial review aspects under the public sector and Railway Labor Act cases of this Court. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by the Sixth Circuit—that enumerated public policy interests will cause a divergence in the application of the agency fee resolving analysis imposed by this Court previously in the duty of fair representation cases arising under public sector laws, the Railway Labor Act, and the National Labor Relations Act, and settled under those statutes.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

ISSUE PRESENTED

Whether the court of appeals erred in determining that a liberal "relationship" standard between activities engaged in by a union and expenses chargeable to non-members is consistent with the Court's duty of fair representation analysis that the activities for which non-members may be charged must relate to the scope of the agency granted, *i.e.*, to bargaining unit based activities only.

SUMMARY OF ARGUMENT

The Center on National Labor Policy is deeply concerned that the decision of the court of appeals, holding it permissible under the Constitution for labor organizations to assess and

spend a non-member's money for purposes unrelated to the bargaining obligation owed to the bargaining unit in which the objector belongs, will be interpreted by other federal and state courts considering the obligations owed by objectors under the statutory duty of fair representation, to permit agency fee monies to be collected and spent for causes hitherto not permitted under this Court's decisions in *Ellis v. BRAC*, 466 U.S. 435 (1984) and *Communications Workers of America v. Beck*, 108 S. Ct. 2641 (1988). The impact on the administration of the Railway Labor Act ("RLA"), National Labor Relations Act ("NLRA"), state law, and undertaken by objectors' private lawsuits and charges before the National Labor Relations Board, will be undercut and threatened, if labor organizations charge nonmembers "dues" incorporating activities for lobbying and persuasion unrelated to the bargaining duty upon which the payment of the agency fee has long been conditioned.

ARGUMENT

I. THE UNIONS' ACTIONS ARE PURSUANT TO PUBLIC POLICY ESTABLISHED BY THE STATE OF MICHIGAN AND MADE POSSIBLE BY VIRTUE OF STATUTORY POWERS CONFERRED BY THE STATE, BUT CAN ONLY BE TOLERATED WITHIN THE SCOPE OF ACTS PERFORMED BY THE UNION IN THE BARGAINING UNIT WITH THE EMPLOYER FOR WHOM IT COLLECTS FEES

The state of Michigan bestowed extraordinary power and authority upon labor unions and has modeled its statutory power grants to labor unions after the National Labor Relations Act, 29 U.S.C. § 158 (1947). Indeed, provisions enlarging the rights of Michigan public employees "adopt word-for-word the analogous provisions of the National Labor Relations Act." *Michigan Employment Relations Comm. v. Reeths-Puffer School Dist.*, 391 Mich. 253, 259, 215 N.W.2d 672 (1974); *Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 53, 214 N.W.2d 803 (1974). In fact, the State of Michigan has gone even further in authorizing labor unions to enter into collective-bargaining agreements under which [illegible] guarantee of continuing employment to

teachers, *viz*, tenure, is conditioned upon the extraction of agency fees or dues to the union. This duty to pay dues supersedes all tenured rights earned in professional service to the educational community. *White Cloud Educ. Ass'n v. Board of Educ. of the White Cloud Public Schools*, 101 Mich. App. 309, 300 N.W.2d 551 (1980). *See also Detroit Board of Educ. v. Parks*, 98 Mich. App. 22, 296 N.W.2d 815 (1980); *Eastern Michigan Univ. v. Morgan*, 100 Mich. App. 219, 298 N.W.2d 886 (1980).

The Michigan Supreme Court has also recognized that public employees were given the statutory right of collective bargaining by the legislature. MICH. COMP. LAW. § 423.211 (1970). *Civil Service Comm. v. Wayne County Board of Supervisors*, 384 Mich. 363, 184 N.W.2d 201 (1971). For purposes here, the State does not recognize the unions' right to bargain as a constitutional right. *Welfare Employees Union v. Michigan Civil Service Comm.*, 28 Mich. App. 343, 184 N.W.2d 247, 254 (1970). Neither did such right exist at common law in Michigan.

However, the action of the public sector union becomes more intrusive as traditional areas of state power is subjected to collective-bargaining. As Professor Summers discussed in *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 Government Union Review 5 (Winter 1980):

> A public employee collective bargaining statute typically carves out a large portion of formerly exclusive legislative and budgetary jurisdiction and requires that the agency share that jurisdiction with the union in the guise of 'bargaining over terms and conditions of employment.' In the educational field, such matters as the length of the school day, class size, teacher recruitment and retention policies, wages and fringe benefits and much else is taken to fall within the phrase 'bargaining over terms and conditions of employment.' Yet decisions on such matters are decisions of public law and policy. Indeed, collectively they go far to determine the very quality of the benefit the government unit exists to provide.

Professor Summers' findings on public employment were adopted by this Court in *Abood v. Detroit Fed. of Teachers*, 431 U.S. 209, 230 (1977): Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cinn. L. Rev. 669 (1975). His description of the activities for which bargaining can be conditioned relates specifically to the bargaining unit rather than expansively to other activities. That was the Court's expectation.

Yet, in the same breath, the Court argued that there was no "uniqueness" between private and public sector employers. But the natural expansion and gravitation of union hierarchical activities into a determined political agenda, did not also contemplate that the public sector union could charge non-members for lobbying that it could not do charge for in the private sector.[1] This dilemma, represented by the facts of this case, were foreshadowed by the concurring Justices in *Abood*.

In *Abood*, the Court specifically found that "public employee unions attempt to influence governmental policymaking," but accepted the tension placed on the First Amendment rights by the agency shop. *Id.* at 231. Then, Mr. Justice Rehnquist, aptly noted in his concurring opinion, that "success in pursuit of a particular collective bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way." *Id.* at 243 (concurring opinion). Mr. Justice Powell's vigorous concurring

[1]For example, the International Union of Automobile and Aerospace Workers represents workers in both the public sector and the private sector. Thus, the workers in *Price v. International Union, UAW, supra*, under the NLRA, and the workers in *Cramer v. Matish*, 705 F. Supp. 1234, 1240 (W.D. Mi. 1989), under the Michigan PERA, receive two different financial disclosures from the International Union under the "Local presumption" theory being applied in the lower courts. *Price*, 722 F. Supp. at 939; *Cramer v. Matish*, 705 F. Supp. at 1241. It is inconceivable that the structure of constitutional law and the duty of fair representation turn upon the employer for whom the employee works. This Court's insistence on enforcing one standard will benefit unions and agency-fee payers alike by ensuring that the lower court's "read off one sheet of music," not three (as is occurring today based on what industry the employee works in).

opinion predicted what would become an unlimited power grant to public sector unions unless more than a "relationship" to collective bargaining was adopted as both a restraint on unions and as protection for First Amendment rights, *Abood*, 431 U.S. at 261 n. 16.

The factor that necessitates the application of chargeable amounts similarly in the three statutory schemes (NLRA, RLA, and public sector) is best represented by the brief of the Detroit Federation of Teachers itself in *Abood*, where it argued that unless "state action" existed to limit the union's actions, collection of a full agency fee would be contrary to the holding of the Court in *Hanson*:

> In *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956), this Court unanimously upheld section 2, Eleventh of the Railway Labor Act, which authorizes labor agreements requiring every employee to tender "the periodic dues, initiation fees and assessments...uniformly required as a condition of acquiring or retaining membership." Appellants would distinguish Hanson as a mere "private sector" case, there was no genuine "state action" in that case, they say, because the federal statute only permits but does not require agreements requiring financial support by employees. Appellants' "state action" disclaimer flies in the face of this Court's express ruling in *Hanson*....Thus, there was clearly "state action" in *Hanson*.

Brief for Appellee Detroit Federation of Teachers, *Abood, et al. v. Detroit Board of Education, et al.*, at 18-19 (September 1976).

In *Beck*, *supra*, the Court found "it not only permissible but altogether proper to read § 8(a)(3), as we read § 2, Eleventh," to "prohibit the collection of fees in excess of those *necessary* to cover the costs of collective bargaining," citing as evidence the fact that "congressional opponents of the Taft-Hartley Act's union-security provisions understood the Act to provide only the most grudging authorization of such agreements, permitting 'union-shop agreement[s] only under limited *and administratively burdensome* conditions.'" 108 S. Ct. at 2653-54 (emphasis added-

)(quoting S. Rep. No. 105, Pt. 2, 80th Cong. 1st Sess., 8 Leg. Hist., at 470 (Minority Report)). It was therefore expected by Congress that unions were to assume an administrative burden in exchange for the right to collect dues.

Hence, this Court recognized the existence of a plain limitation on a private sector union's power to collect dues, for it emanates from the same concepts on First Amendment limitations as a public teachers' union does. *Abood*, 431 U.S. at 230 ("the very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work a greater infringement upon the First Amendment interests of public employees."). This concept was erroneously rejected by the Sixth Circuit below:

> While it is clear, under *Street* and *Allen*, that dissenting employees in the private sector may not be charged for political or ideological union activities, we believe that the lobbying and other "political" activities of the union in this case were, as required by *Ellis*, "reasonably employed to implement or effectuate the duties" of the Ferris Faculty Association as the exclusive representative of the *public* employees at Ferris State College.

Pet. 7a.

Recently, in *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1400-01 (1990), this Court faced the question whether the regulation of independent expenditures under the Michigan Campaign Finance Act violated the First Amendment. The Court made the appropriate comparison with *Abood* and *Beck* and stated the equivalent rule in the labor law:

> An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its *duties* as the exclusive representative of the *bargaining unit* on labor management issues. As a result, the funds available for a union's political activities more accurately reflects members' support for the organization's political views

> than does a corporation's general treasury. (Emphasis added).

Certainly, this comparison made to both the public and private sector cases, demonstrates the inherent power of an employee to object to "political activities" that do not relate to the union's "duties" for the "bargaining unit."

Finally, in *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990), this Court necessarily compared the State's integrated bar dues requirements with the First Amendment analysis undertaken in *Abood*, *Hanson*, *Ellis*, and *Hudson*. The Court stated that

> We think that these differences [to provide specialized legal advice to the public] between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the use of compulsory dues as are labor unions representing public and private employees.

1109 S. Ct. at 2235.

This statement recognizes that the Court has long viewed the restraint on public and private sector union dues as the same, although the legal basis might be different. In the Court's further citation to *Ellis*, the line was drawn back "to the purpose for which compelled association was justified": "the test must be whether the challenged expenditures are necessarily or reasonably incurred *for the purpose of performing the duties* of an exclusive representative of the employees *in dealing* with *the employer* on labor-management issues. 110 S. Ct. at 2236 (emphasis added).

Accordingly, the decision of the Sixth Circuit violates the principals set out by this Court limiting a union to collecting dues from objectors only for activities undertaken in the performance of its duties vis-a-vis the employer with whom it agreed under the relevant law to negotiate with. The record in the case at bar, permitted the Respondents Ferris Faculty Association/MEA/NEA to charge for lobbying at the State level when the contract is

signed by Ferris College. That act violates the bargaining unit principle applied to properly charged fees.

II. THE DUTY OF LABOR UNIONS TO LIMIT THEIR CHARGEABLE EXPENDITURES TO ACTIVITIES GERMANE TO THE BARGAINING UNIT IS FUNDAMENTAL TO ANY RATIONAL INTERPRETATION OF THE DUTY OF FAIR REPRESENTATION UNDER ANY STATUTE

Two fundamental issues are raised under the Court's decision in *Abood* and *Communications Workers v. Beck*, 108 S.Ct. 2641 (1988), applicable to resolving this case: first, whether employees under Michigan law or the NLRA/RLA can be required to fund their exclusive representative's (or their representative's affiliate's) collective bargaining costs incurred for employees in other bargaining units; and second, must the representative's financial disclosure to unit employees be made on a bargaining unit by bargaining unit costs basis. If this Court were to change this standard, the repercussions under the RLA and NLRA would be overwhelming.

In *Abood*, 431 U.S. at 221 n.15, this Court set up as a baseline for consideration of its constitutional analysis, the limitation it had imposed under the National Labor Relations Act in order to avoid an open-ended assault on the Freedom of Association protected by the First Amendment through the establishment of collective bargaining. For "[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests." *Id.* at 222. Hence, the Court went on to review that limitation imposed under the NLRA with the reference to *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976), that,

> "the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility *equal in scope to its authority*, 'the responsibility and duty of fair representation.'"

> . . .with respect to the railroad industry. . .and. . .with respect to those industries reached by the National Labor Relations Act, the duty of fair representation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' *Vaca v. Sipes, supra*, 386 U.S. at 182, 87 S.Ct. 903.

Furthermore, in *Abood*, the Court justified the constitutional intrusion on individual rights made by the State of Michigan on Congress' similar "assessment of the important contribution of the union shop to the system of labor relations," *id.* at 222, it established. *Id.* at 224 ("governmental interests advanced. . .are much the same as those promoted by similar provisions in federal labor law."). But the judgment that the Congress could so intrude had a recognizable limitation, which the *Street* Court explained, and the Court in *Abood*, 431 U.S. at 223, adopted:

> The furtherance of the common cause leaves some leeway for the leadership of the group. *As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.* If that were allowed, we would be reversing the *Hanson* case, *sub silentio*.

This limitation the Court found also applied under Michigan law:

> A union so designated is under a duty of fair representation to all employees in the unit, whether or not union members. *E.g., Lowe v. Hotel & Restaurant Employees, Local 705*, 389 Mich. 123, 145-152, 205 N.W. 167, 177-180; *Wayne County Community College Federation of Teachers Local 2000 v. Poe*, 1976 Mich.Emp.Rel.Comm'n 347, 350-353; *Local 836, AFSCME v. Solomon*, 1976 Mich.Emp.Rel.Comm'n 84, 89.

Abood, 431 U.S. at 224.

The judgment of the Michigan Court of Appeals was therefore enforced in *Abood*, 431 U.S. at 232, "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." This same bargaining unit standard has been applied by the Court in all cases.[2]

But, while there may be some issues in *Abood* or *Beck* that require major discussion and analysis by the parties here, the "bargaining unit standard of chargeability and disclosure" should *not* have been among them or rejected by the court of appeals below. The bargaining unit standard is enshrined in the plain language of the NLRA, RLA and this Court's public sector decisions and are part and parcel of the effectuation of the "governmental interest" at all levels of the federal/state system, through all types of election procedures, and are uniformly applied, for example, in Board decisions and court cases to reduce or eliminate conflicts of interest among represented employees.

Abandonment of the bargaining unit concept in agency fee cases would not only require excision of language from the NLRA and presumably the RLA,[3] but also revision of the Board's Case Handling Manual, and recantation of the Board's positions in its own case decisions and before the courts. And it would exacerbate, and not reduce or eliminate, the conflicts of interest inherent in exclusive representation.

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[2]In *Beck*, 108 S. Ct. at 740-42, the Court affirmed the lower courts' holding that it was a breach of the duty of fair representation to expend plaintiffs' fees for "purposes other than bargaining unit representation."

[3]The Court in *Beck*, 108 S. Ct. at 2648-49, stated the decision in *Street* "is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical. Indeed, we have previously described the two provisions as 'statutory equivalent[s],' *Ellis v. Railway Clerks*, 466 U.S. 435, 452 n. 13, 104 S.Ct. 1883, 1894 n. 13, 80 L.Ed.2d 428 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism *only to the extent necessary* to ensure that those who enjoy union-negotiated benefits contribute to their cost." (Emphasis added).

In short, every available resource concerning the intent of Congress[4] and the Board's administration of the NLRA confirms that employees can only be charged for their § 9 (a) representative's negotiation and enforcement of the governing collective bargaining agreement, and that the required financial disclosure must be on a unit by unit basis.[5]

The reasons for this position are found in the Act, the Board's Rules & Regulations, the Board's Case Handling Manual, Board decisions, this Court's decisions, and decisions in Duty of Fair Representation cases. As set out *supra*, this statute is relevant. We take those categories of authorities in the order listed without belaboring them.

CHARGEABILITY STANDARD

The NLRA itself is the departure point for the correct analysis of the issues presented:

> Representatives designated or selected for the purposes of collective bargaining by the major-

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[4]The limitation on dues applied by this Court in *Street* and *Hanson* arise from the potential conflict with the First Amendment this Court did not presume Congress intended to transgress. The "nearly identical language" of the NLRA § 8(a)(3) and RLA § 2, Eleventh "reflects the fact that in both, Congress authorized compulsory unionism only to the extent necessary to ensure that those who *enjoy* union-*negotiated* benefits contribute to *their* costs." *Beck*, at 2649 (emphasis added). Employees do not "enjoy" the benefits negotiated in other units, and the purported benefits of lobbying, political action, public relations, and professional/educational activities are not "negotiated" benefits.

[5]The potential impact on Board caselaw is a fair one to make since the Michigan Public Employment Relations Act was fashioned after the NLRA and its Public Employment Relations Commission decides cases consistent with the NLRA, as demonstrated *supra* at 4. In *Abood*, 431 U.S. at 223, the Court remarked that "[u]nder Michigan law employees of local government units enjoy rights parallel to those protected under federal legislation. . . and [s]everal aspects of Michigan law [that] mirror provisions of the Railway Labor Act are of particular importance here."

ity of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .[6]

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .[7]

For the purposes of this section, to bargain collectively is the performance of *the mutual obligation of the employer and the representative of the employees* to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .[8]

Thus, it could not be clearer: a § 9 (a) representative is selected to represent a particular bargaining unit of employees; the bargaining unit concept is embedded in the statute to insure "employees the fullest freedom in exercising the[ir] rights guaranteed by" the Act, and it is *the* representative and *the* employer that have bargaining obligations under the statute.[9]

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[6] National Labor Relations Act (NLRA) § 9 (a), 29 U.S.C. § 159 (a). (Emphasis added.)

[7] NLRA § 9 (b), 29 U.S.C. § 159 (b).

[8] NLRA, § 8 (d), 29 U.S.C. § 158 (d).

[9] We do not belabor this point in the text, but we would be remiss not to also note that this same bargaining unit-bargaining agent-employer concept is central to the Act's other provisions. In particular, we refer to the election

Similarly, § 17.455(11) of the Michigan PERA, limits the breadth of the labor organization's representation:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes shall be the exclusive representative of all the public employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

It is the last clause of the above statute which has drawn the unions to charge for their lobbying activities. As this Court read this language to permit charges for "related" activities in *Abood*, 431 U.S. at 242, *Amicus* respectfully submits that this language was useful to the Court because the complaint's allegations were "general ones...and the parties have neither briefed nor argued the question of what specific union activities in the present context properly fall under the definition of collective bargaining." *Id.* at 236. This case presents the opportunity to draw that line and apply the bargaining unit standard employed under the NLRA and RLA.

B. THE BOARD'S RULES & REGULATIONS

The National Labor Relations Board's Rules and Regulations, as would be expected, adhere to the bargaining unit concept. A partial list of the more significant provisions which do so include:

> A petition for certification, when filed by an employee or group of employees. . .shall contain the following:
> (4) A description of the bargaining unit which the petitioner claims to be appropriate.[10]

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provisions, § 9 (c) (l) (A), 29 U.S.C. § 159 (c) (l) (A); and § 9 (e), 29 U.S.C. § 159 (e).

[10] Rules & Regulations § 102.61 (a).

A petition for certification, when filed by an employer, shall contain the following:
(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in *the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.*[11]

A petition for decertification shall contain the following:
(2) The address of the establishment and a description of the bargaining unit involved.[12]

A petition for clarification shall contain the following:
(4) A description of the present bargaining unit and, if the bargaining unit is certified, an identification of the existing certification.[13]

Contents of Petition to rescind authority [under § 9 (e) (1) of the Act].—
(d) A description of the bargaining unit involved.[14]

The Michigan statute, PERA § 17.455(12) sets out a similar rule to entertain a petition for an election: "[b]y a public employer or group of public employees, or an individual or labor organization acting in their behalf, alleging that 30% or more of the public employees within a unit claimed to be appropriate for such purpose."

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[11] Rules & Regulations § 102.61 (b).

[12] Rules & Regulations § 102.61 (c).

[13] Rules & Regulations § 102.61 (d).

[14] Rules & Regulations § 102.84.

The Michigan PERA and the Board's Rules and Regulations, then, confirm the fundamental importance of the bargaining unit concept to the proper administration of the PERA as well as the NLRA.

C. BOARD DECISIONS

Decisions of the Board which are completely grounded on the bargaining unit concept are legion. Indeed, they are so numerous, and the proposition so well understood, that we see no need to exhaustively cite those cases. However, we refer to two cases, arising in the context of a demand for bargaining, that are frequent authorities for the proposition upon which we rely:

> In order to impose a bargaining duty upon an employer, the union's demand should "clearly define the unit for which recognition is sought."[15]
>
> Because of this substantial deviation between the appropriate unit and the unit specified in the. . . bargaining demand, that demand was not a proper request to bargain. . . .[16]

D. SUPREME COURT UNIT STANDARD DECISIONS

The cases arising in this Court confirm that the bargaining unit concept is at the heart of the NLRA:

> Together, these provisions establish the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment," with

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[15] *Motown Record Corporation*, 197 N.L.R.B. 1255 (1972) (Chairman Miller & Members Kennedy and Penello).

[16] *Chester Valley, Inc.*, 251 N.L.R.B. 1435 (1980) (Chairman Fanning & Members Jenkins and Truesdale).

"the representatives of his employees" designated or selected by a majority "in a unit appropriate for such purposes." This obligation extends *only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents.*[17]

Section 9 (b) of the Act vests in the Board authority to determine "the unit appropriate for purposes of collective bargaining." * * * The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a "community of interest." * * * A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining (citing *Pittsburgh Plate Glass*), and prevents a minority interest group from being submerged in an overly large unit (again citing *Pittsburgh Plate Glass*).[18]

E. SUPREME COURT FAIR REPRESENTATION DECISIONS

Beck, supra, confirmed that it is a *per se* violation of the Duty of Fair Representation (DFR) for a union which is the exclusive representative under § (9) (a) of the Act to "exact" or "collect", under the guise of the costs of statutory representation, fees which exceed the costs of collective bargaining, contract administration, and grievance adjustment. In determining the breadth and limits of the DFR, the Court has said:

> Under [the Duty of Fair Representation] the exclusive agent's statutory authority to represent *all members of a designated unit* includes

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17 *NLRB v. Pittsburgh Plate Glass*, 404 U.S. 157, 164 (1971).

18 *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985).

> a statutory obligation to serve the interests of all [unit] members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[19]
>
> Their [bargaining representatives'] statutory obligation *to represent all members of an appropriate unit* requires them to make an honest effort to serve the interests of all of those members, without hostility to any.[20]
>
> The exclusive agent's obligation to "represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all those members, without hostility to any." *** [A]nd its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion."[21]

The statutory duty of fair representation, which provides the justification for the agency shop, "extends not only to the negotiation of the collective bargaining agreement itself, but also to the subsequent enforcement of *that* agreement, including the administration of any grievance procedure *the* agreement may establish." *Beck*, 108 S. Ct. at 2645 (emphasis added).

And, pertinent to this discussion, the Court has said in an anti-trust case:

> [T]here is nothing in the labor policy [of the United States] indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours, and work-

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19 *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). (Emphasis added.)

20 *Ford Motor Company v. Huffman*, 345 U.S. 330, 337 (1953).

21 *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

ing conditions of other bargaining units or to attempt to settle those matters for the entire industry. On the contrary, *the duty to bargain unit by unit* leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant without being straight-jacketed by some prior agreement with the favored employers.[22]

F. UNION DEFENSE OF DFR LAWSUITS

We understand the union-respondents in the instant case to claim that they can charge employees in a given bargaining unit for their costs of negotiating and enforcing bargaining agreements in other units. This position is, in principle, precisely contrary to the positions taken by labor organizations in defending DFR cases. In such cases they argue—and successfully—that if they are not the exclusive representative there is no DFR liability. In responding to such arguments, the courts have said;

> The scope of the duty of fair representation is coextensive only with the union's statutory authority to act as the exclusive representative of all employees within the bargaining unit. If a union does not serve as the exclusive agent

[22] *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965).

> for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation.[23]
>
> The duty of fair representation was created by the federal courts, but it only applies to labor organizations, by virtue of their status as the exclusive bargaining representative of individual workers.[24]

In a case defended on the basis that the labor organization is not the exclusive representative, the court concluded:

> The district court determined there was uncontroverted evidence the International was not a party to the collective bargaining agreement and that the agreement recognized only the employees' local union. * * * For this reason, the court held there was no basis for imposing liability on the International premised on breach of a statutory duty of fair representation.[25]

In cases defended on the basis that the labor organization was not the exclusive representative for that kind of activity, the courts have concluded:

> ALPA owed plaintiff no duty of representation before the FAA, nor did its assistance to the FAA prevent plaintiff from procuring independent representation or representing himself before the FAA. Thus the exclusivity factor is absent. * * * Thus the Court can find no

[23] *Barrett v. Ebasco Constructors*, 868 F.2d 170, 171 (5th Cir. 1989).

[24] *Allied Mechanical Contractors v. Industrial Relations Council*, 685 F. Supp. 552, 565 (W.D. N.C. 1988).

[25] *Tongay v. Kroeger Co.*, 860 F.2d 298, 299 (8th Cir. 1988).

> rationale that would justify application of the doctrine of fair representation to the facts alleged by plaintiff.[26]
>
> It will be observed that the [Supreme] Court, in the case creating the duty of fair representation, repeatedly rooted that duty in the powers conferred upon the union by the statute, the powers belonging to the union as exclusive representative. The duty was thus co-extensive with the power; the duty is certainly not narrower than the power, and this formulation indicates that it is also not broader.[27]

Thus, it is readily seen that unions which are exclusive representatives want "to have their cake and eat it too." On the one hand, they demand (unlawfully) representation fees to defray costs for bargaining units and activities for which they are not the exclusive representative of the individual employees' upon whom the demand is made. On the other hand, they defend DFR suits by reference to the well-understood principle that DFR is coterminous with the exclusive representative's authority under the Act to be the collective bargaining agent for a particular unit of employees.

G. THE COURT'S *ELLIS* DECISION

But all of this discussion about a § 9 (a) representative's general powers should be unnecessary and redundant in the *Beck* context. The Court has already concluded that the bargaining unit standard of chargeability is correct. It did so in the case of

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[26] *Florey v. ALPA*, 439 F. Supp. 165, 170 (D. Minn. 1977).

[27] *NTEU v. FLRA*, 800 F.2d 1165, 1169 (D.C. Cir. 1986) (Public-sector exclusive representative has no duty to provide attorneys to represent employees in discharge hearings not provided by the collective bargaining agreement. Court concludes that public-and private-sector DFR is the same). *Accord*, *AFGE v. FLRA*, 812 F.2d 1326 (10th Cir. 1987).

Ellis v. BRAC, 466 U.S. 435 (1984). There, the Court addressed and resolved the issue for that and other cases. No valid reason exists to reconsider this issue in this case.[28] In *Ellis*, the Court has said:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of *the* employees in dealing with *the* employer on labor-management issues.[29]
>
> [W]here a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective-bargaining unit already represented. Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer.[30]
>
> The expenses of litigation not having such a connection with the bargaining unit *are not to be charged to objecting employees.* * * * [U]nless the Western Airlines bargaining unit is *directly concerned*, objecting employees need not share the costs of the union's challenge. . . .[31]

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[28] *Beck*, at 2657, cites *Ellis* with approval on this point.

[29] *Ellis* at 448. (Emphasis added.)

[30] *Ellis* at 452. Union organizing was ruled nonchargeable in the case. *Ellis* at n. 11.

[31] *Ellis* at 453.

H. DISCLOSURE STANDARD

It is clear under the Court's decision in *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986), and the Board General Counsel's Memorandum GC-88-14, which adopts *Hudson*, that, "[b]asic considerations of fairness . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."[32] Where payments are made "to affiliated state and national labor organizations . . . either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required."[33] No matter what level of the union lays claim to a portion of the fee, the goal of *Hudson* disclosure is "adequate disclosure [which] surely would include the major categories of expenses, as well as verification by an independent auditor."[34]

Certainly there is no basis for requiring less from the organization, or part of an organization, claiming the fee than the exclusive representative must provide. Indeed, under the statutory construct considered above, only the § 9 (a) representative is entitled to a fee under § 8 (a) (3). (A 9(a)'s affiliate *might*, theoretically, be entitled to claim some fee, to the extent that it can affirmatively show, in its audited financial disclosure, that it has actually expended funds to *directly* support the negotiation or administration of *the particular collective bargaining agreement*) It is by virtue of that status, and the statutory functions that are presumably performed in some measure, that the fee can be justified at all. If, through some incapability on its part to perform statutory duties, the exclusive representative subcontracts for those services, at least the same disclosure is required as if it had performed those services itself. If that were not true, the § 9 (a) representative could merely avoid the disclosure requirements that are a condition of its entitlement to

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32 *Hudson* at 306.

33 *Hudson* at n. 18.

34 *Hudson* at n. 18.

receipt of financial core dues, merely by subletting all of those services and denying disclosure on the theory that the other organization is not the § 9 (a) representative. Such a subterfuge cannot be legitimate and militates against adoption of some lesser disclosure by organizations claiming financial core fees which are nor the § 9(a) representative.

CONCLUSION

The authorities cited by *Amicus* establish two principles of importance to the inquiry that this Court must consider in resolving the instant case. First, the legitimate costs pool for the exclusive representative's charge to nonmembers is the bargaining unit for which the charge is being levied. Second, the audited financial disclosure made by affiliates of the exclusive representative to justify the financial core fee must be as detailed and complete as those made by the exclusive representative. Any other results, on these points, would ignore the statutory and constitutionally based limitations and the uniform application, by the Board and the courts; the contours of the Duty of Fair Representation as limited by the exclusive representative's exclusivity status; the standard of chargeability determined in *Ellis* and the disclosure requirements of *Hudson*.

WHEREFORE, for the foregoing reasons, *Amicus Curiae* Center on National Labor Policy respectfully submits that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and remanded.

Respectfully submitted,

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